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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROBERT HICKS,

Plaintiff and Appellant,

v.

LOS ANGELES COUNTY
METROPOLITAN TRANSPORTATION
AUTHORITY,

Defendant and Respondent.

B203301

(Los Angeles County
Super. Ct. No. BC327247)

APPEAL from a judgment of the Superior Court of Los Angeles County.
James A. Chalfant, Judge. Affirmed.

Robert Hicks, in pro. per., for Plaintiff and Appellant.

No appearance by Defendant and Respondent.

Plaintiff and appellant Robert Hicks, in pro. per., appeals from the summary judgment entered against him and in favor of defendant and respondent Los Angeles County Metropolitan Transportation Authority (MTA) on August 28, 2007. MTA has not filed a respondent's brief. (Cal. Rules of Court, rule 8.220(a)(2).) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was employed by MTA as a bus operator. In December 2001, United Transportation Union (UTU) Vice Chairman Timothy Del Cambre, wrote a letter on appellant's behalf to the MTA labor relations manager asking him to review a discrepancy in the calculation of appellant's sick pay. Del Cambre understood that the matter was soon thereafter resolved.

On November 7, 2002, appellant was involved in an altercation with a female passenger, which was captured on videotape. As a result of this incident, appellant was arrested for assault and battery, detaining a passenger, worker's compensation fraud, and making fraudulent statements to MTA officials about the incident.¹ Appellant maintained that the altercation stemmed from his unique sensitivity to the loud music coming from the passenger's headphones and his fear of being assaulted by the passenger's brothers.

On November 21, 2002, Del Cambre was appellant's union representative at a "first level" grievance hearing regarding the incident. Del Cambre spoke to appellant on a number of occasions prior to the hearing but appellant never provided Del Cambre with any evidence for his defense. Although appellant maintained that the videotape of the incident had been altered, Del Cambre saw no evidence of this. On November 22, 2002, MTA terminated appellant's employment.

On appellant's behalf, UTU Chairman Thomas Isaacs successfully petitioned for a "second level" hearing to review the termination decision. Before that hearing, Isaacs

¹ Appellant subsequently prevailed in the legal proceedings arising out of these charges.

spoke to appellant by telephone several times and met with him once. He asked appellant for medical documentation of his hearing sensitivities, but appellant never provided any. Isaacs's independent investigation failed to find any witnesses to the incident. Isaacs did not know that appellant suspected he was being fired in retaliation for improprieties relating to his sick pay, so he never investigated that issue. Isaacs also reviewed the videotape and did not observe any signs of alteration. At the hearing on January 31, 2003, at which the videotape was played, Isaacs urged the MTA to be lenient with appellant because of the difficult neighborhood in which he was driving and his hearing sensitivity. The MTA was not persuaded.

In early 2004, appellant, Isaacs acting as appellant's union representative, attorney Lawrence Drasin who represented the UTU, and an MTA labor relations official met to discuss whether the union would pursue the matter to the next level of appeal provided for in the collective bargaining agreement: binding arbitration. Although appellant still maintained the videotape had been altered, Drasin did not observe any signs of alteration. At a subsequent meeting of the UTU General Committee of Adjustment, Isaacs recommended that the union allow appellant to arbitrate his case. Drasin's written recommendation was to the contrary because, based on the videotape, he believed appellant's actions were indefensible. The committee voted against allowing appellant to pursue arbitration.

In January 2005, appellant filed this action against the MTA seeking damages for wrongful termination and breach of contract. After summary judgment was granted on those causes of action because appellant had failed to timely submit a claim and failed to exhaust his administrative remedies, the trial court allowed appellant to amend his complaint to add a claim that his union breached its duty of fair representation. The amended complaint alleged causes of action for breach of implied contract of continued employment, breach of covenant of good faith and fair dealing, breach of contract (common counts), and breach of duty of fair representation. It alleged that the MTA: discharged appellant in retaliation for his "whistle-blowing" relating to the sick pay discrepancy; altered the videotape; refused to consider evidence that the videotape had

been altered; UTU interfered with appellant's ability to pursue his grievance through the appeal process by abandoning the arbitration, failing to investigate, and failing to keep appellant informed of the status of his case; UTU failed to consult appellant about exculpatory evidence; and, at a hearing at which he was representing appellant, Drasin impugned the veracity of appellant's claim that the videotape had been altered; UTU failed to inform appellant of various procedural rights he had under the collective bargaining agreement.²

In May 2007, MTA filed a motion for summary judgment on the amended complaint supported by the declarations of Isaacs, Drasin, and Del Cambre. The motion was also supported by a declaration from Michael Jones, a board certified court video specialist, who opined that the videotape of the incident had not been altered. The gist of the motion was that the UTU did not breach its duty of fair representation and therefore all of appellant's claims against the MTA fail as a matter of law.³

The motion was heard on August 21, 2007. In a detailed written decision, the trial court concluded that the UTU did not breach its duty of fair representation; rather, it made an informed decision not to pursue appellant's case to arbitration because of unfavorable evidence. The trial court reasoned that, to prevail against the MTA, appellant had to show that UTU breached a duty of fair representation because appellant's employment with the MTA was governed by a collective bargaining agreement, which precludes appellant from filing a lawsuit against the MTA unless he

² The amended complaint also purported to add the UTU as a defendant, but because appellant had failed to obtain leave of court to do so, the UTU was stricken and appellant never pursued the matter.

³ Although UTU had previously been dismissed from the action as a party defendant, Drasin, on behalf of UTU, filed a notice of joinder in MTA's motion. On June 20, 2007, appellant wrote to Drasin asking him to withdraw from his representation of the UTU in this case because of a conflict of interest stemming from Drasin's prior representation of appellant in the grievance hearings; in response, Drasin explained that he had always represented the UTU, never appellant. On June 28, appellant filed a motion to "quash" Drasin's declaration filed in support of the summary judgment motion.

first exhausts his administrative remedies under the agreement. The only issue, therefore, was whether the UTU's decision not to pursue arbitration violated appellant's right to fair representation. The trial court concluded: "[I]t is irrelevant, for purposes of this proceeding, whether [appellant] or his passenger was the initial aggressor in the incident that led to the MTA's decision to terminate his employment. [Appellant] may be correct that he was not. However, that is not the pertinent issue. [Appellant] lost his claim of wrongful termination because he failed to timely present it. The only claims that remained were contract-based claims, and the only issue for those claims is whether UTU committed fraudulent or otherwise dishonest conduct unrelated to legitimate union objectives in failing to pursue the arbitration. . . . The evidence is uncontradicted that UTU adequately represented [appellant] at two levels of grievance hearings, and did not go forward with an arbitration where there appeared to be no prospect of success. It does not matter if UTU was wrong; all that matters is that its actions were not arbitrary, discriminatory, or in bad faith." Accordingly, the trial court granted summary judgment (the August 28 order).

Appellant's motion for reconsideration was denied on October 25, 2007. On October 25, 2007, appellant filed a notice of appeal from the judgment.

On November 8, 2007, appellant filed a "Motion to Vacate/Set Aside Final Court Order Entered 8/28/07." On November 28, 2007, the trial court denied that motion.

STANDARD OF REVIEW

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary

judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal.App.4th 4, 9.)

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2) & (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of his pleadings, “but, instead, shall set forth the specific facts showing that a triable issue of material fact exists” (*Id.*, subd. (p)(2).) A triable issue of material fact exists “if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted; *Santillan v. Roman Catholic Bishop of Fresno*, *supra*, 163 Cal.App.4th at p. 9.)

DISCUSSION

1. *Appellant Has Not Shown the Existence of Any Triable Issue of Material Fact*

Defendant contends the trial court erred in granting summary judgment in favor of MTA. As we understand his argument, it is that the whether he received fair representation from the UTU was a triable issue of fact because the evidence submitted by MTA to establish that he received fair representation -- the declarations of Drasin, Isaacs, Del Cambre, and Jones -- was not credible. He asserts that the “UTU was a part of the MTA’s set up, to get rid of the [a]ppellant because, the MTA management was exposed stealing sick pay hours from the [a]ppellant in 2001.” We find no error.

“[U]nions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad

faith. [Citations.]” (*Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213, 1219.) “The duty of fair representation is not breached by mere negligence. [Citation.] A union is accorded wide latitude in the representation of its members and courts are reluctant to interfere with a union’s decisions in representing its members absent a showing of arbitrary exercise of the union’s power. [Citations.]” (*Ibid.*) This is because it is “essential that labor organizations have some freedom and discretion in handling employee disputes with employers. The union and employer must be able to develop a consistent interpretation of the terms of the collective bargaining agreement, rather than being compelled to follow the desires of every individual union member. In order to prevent the settlement mechanism from being clogged by meritless complaints, the union must be permitted to sort out the substantial grievances from the unjustified ones. If the union did not have the power to settle or discard groundless complaints, the employer would have little motivation to participate in a dispute resolution mechanism. [Citation.] The union’s resources could also be depleted as a result of being forced to pursue meritless complaints. Further, important public interests are served by preserving unions as viable entities and preventing their financial depletion as a result of extended legal liability. For these reasons a union is held to have breached the duty of fair representation only if it acts arbitrarily, discriminatorily, or in bad faith. [Citations.]” (*Lane v. I.U.O.E. Stationary Engineers* (1989) 212 Cal.App.3d 164, 169.)

Here, other than challenging the veracity of MTA’s evidence, appellant has not set forth any specific facts showing conduct that would give rise to liability under the duty of fair representation. Accordingly, he has not established any triable issue of material fact.

DISPOSITION

The judgment is affirmed. Each side shall bear their own costs on appeal.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.